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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

WALKER L. CHANDLER; SHARON T. HARRIS;
JAMES D. WALKER,

Petitioners,

v.

ZELL D. MILLER, Governor;
MAX CLELAND, Secretary of State;
JAMES G. LEDBETTER, Commissioner Department of
Human Resources State of Georgia,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

1. Does Georgia O.C.G.A. § 21-2-140, that allows suspicionless searches of candidates for political office, violate the Fourth Amendment under the guidelines set out in *Von Raab* and *Skinner*.

2. Is the establishment of the drug-testing scheme as set forth in O.C.G.A. § 21-2-140 a restriction on free expression as well an unconstitutional restriction upon the rights of voters to choose their elected officials, thus, violating the First Amendment of the United States Constitution.

LIST OF ALL PARTIES TO THE PROCEEDINGS

All Parties are named in the caption.

There is no parent or subsidiary company to be listed.

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CITATIONS TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported at 73 F.3d 1543.

The decision of the United States District Court in the Northern District of Georgia is an unreported decision.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on January 22, 1996, The Court of Appeals denied petition for rehearing on April 26, 1996. This Court has jurisdiction to issue the requested writ of certiorari under 28 U.S.C. 1254(1) because appellants seek review of an adverse decision rendered by the United States Court of Appeals for the Eleventh Circuit.

U.S. CONSTITUTIONAL PROVISIONS

U.S. Constitution:

First Amendment - Religious and political freedom.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourth Amendment - Unreasonable searches and seizures.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATUTORY PROVISIONS INVOLVED

O.C.G.A. § 21-2-140

STATEMENT OF CASE

A. Factual Background

Plaintiffs-Appellants Walker Chandler, Sharon Harris, and James D. Walker respectfully petitioned for rehearing, and suggested rehearing *en banc*, of the panel decision in *Chandler, et al v. Miller*, 73 F.3d 1543 (11th Cir. 1995) which was denied on April 18, 1996.

In May of 1994, and prior to filing their notices of candidacy for statewide political office and their "drug-free" certificates and paying their qualifying fees, plaintiffs filed this action in the district court. Therein they challenged the constitutionality of the O.C.G.A. § 21-2-140 requirement that they submit certificates showing that they had submitted to urine testing and that such testing had proved negative for the presence of illegal drugs.

After hearing oral argument, the district court issued an order (June 21, 1994) denying Plaintiff's motion for a preliminary injunction. On January 31, 1995, the district court entered a consent order and final judgment incorporating its findings of law which it included in its order of June 21. Plaintiffs-Appellants appealed.

The three-judge panel of the Eleventh Circuit Court of Appeals, in a 2-1 decision, affirmed the judgment of the district court. *Id*. The holding that the law requiring the suspicionless drug-testing of candidates does not violate either Fourth or First Amendment guarantees conflicts with the district court's ruling in *Georgia Association of Educators v. Harris*, 749 F.Supp. 1110 (1990), as well as with the logic set forth by the Supreme Court in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed. 2d 685 (1989), *Skinner v. Railway Labor*

Executives' Ass'n, 489 U.S. 602 , 109 S.Ct 1402 (1989), and *Vernonia School District 47J v. Acton,* ____U.S.____, 115 S.Ct. 2386 (1995).

B. Basis of Jurisdiction in the Court of First Instance.

28 U.S.C. 1331, 1243, 2201, 2202, and 42 U.S.C. 1983 *et. seq.*

SUMMARY OF ARGUMENT

I. Georgia Statute § 21-2-140 violates of the Petitioner's Fourth Amendment right to be free from unreasonable Search.

A. The Georgia law O.C.G.A. § 21-2-140 violates the Petitioner's Fourth Amendment right under the analysis of the Court set out in *Von Raab* and *Skinner*, which requires there be a compelling governmental interest that are supported by facts and not mere speculation. No compelling interest supported by facts exit in the in the present case.

B. The candidates Fourth Amendment right to be free from unreasonable search is not diminished where no history of problems exist with drugs being used by candidates for political office. Nor do the candidates have a diminished expectation of privacy where there exist no scheme of pervasive monitoring and regulation of those candidates. The candidates are unlike the individuals in *Skinner* and *Von Raab*, whereby the historical evidence of the problem and the pervasive regulation and monitoring of the employees allowed for warrantless and, in some circumstances, suspicionless searches. In the present case, a balancing of the individual's Fourth Amendment right against the government's interest must be done to determine whether the Fourth Amendment would prohibit the search. The government's interest in conducting the suspicionless searches of candidates has little weight, in the fact that the

government's only discernible interest is symbolic and the drug test is easily avoided. However, the Petitioner's interest in being free from an unreasonable search in an area traditionally shielded by great privacy has great weight.

C. The logic of allowing suspicionless searches based on an unreasonable fear that is not supported by any facts, opens the door for an effective judicial repeal of the Fourth Amendment.

II. Georgia Statute § 21-2-140 is a violation of the Petitioner's First Amendment right of free speech.

A. The candidate's refusal to take a drug test is an action that is a deliberate statement made by the libertarian candidate, recognized as speech under the First Amendment, analogous to the symbolic action taken in *Texas v. Johnson*. The prohibition of the candidate's right to refuse taking the drug test, refusal resulting in the disqualification of his or her eligibility to be a candidate for state office, is a prohibition of free speech. The prohibition of free speech is a violation of the candidate's First Amendment right.

B. When the right of free speech is abridged by the government, a significant and compelling interest by the government is required to overcome the weight of the Petitioner's First Amendment right and the Fourth Amendment rights. No evidence exist that there is a problem with candidates or those using drugs or any other resulting problem; and the only logical reason for the State to require the testing is to compel the candidates to make a symbolic statement of support for the drug war. Therefore, the weight of the government's right is insignificant in relation to Petitioner's rights and this restriction on free speech violates the First Amendment.

C. O.C.G.A § 21-2-140 is an unconstitutional restriction upon the rights of voters to choose their elected officials, thus, violating the First Amendment.

ARGUMENT

I. Georgia Statute § 21-2-140 is a violation of the Petitioner's Fourth Amendment rights.

A. The Georgia law O.C.G.A. § 21-2-140 violates the Petitioner's Fourth Amendment right under the analysis of the Court set out in *Von Raab* and *Skinner*, which requires there be a compelling governmental interest that is supported by facts and not mere speculation.

The Court has ruled that certain warrantless suspicionless searches by the government, normally prohibited by the Fourth Amendment of the U.S. Constitution, will be allowed in situations where there has been historical evidence of a previous problem that produced great damage. Also, the Court has allowed these searches in areas that are pervasively regulated. In the case at bar, there is no historical basis and no evidence of a problem, and political candidates are not within a group that have a history of being pervasively regulated and supervised, which would result in a diminished expectation of privacy.

In the *Skinner v. Railway labor Executives' Ass'n*, 489 U.S. 602, 109 S.Ct. 1402 (1989), the court noted the long history of alcohol and drug abuse involved in the railroad industry. In addition, the Court noted the millions of dollars of damage and the substantial loss of life resulting from accidents where alcohol or drug use was indicated or determined to be the cause or contributing factor. 489 U.S., at 607, 109 S.Ct., at 1408 (1989). The regulations provided that a breath or urine test, or both, could be required after an accident or certain dangerous incidents. 489 U.S. at 611, 109 S.Ct., 1410. Also, where a

supervisor has reasonable suspicion that an employee is under the influence of alcohol, that supervisor may require a breath test. The regulations in *Skinner* that were held constitutional allowed warrantless searches/drug tests of railroad employees. They were allowed because the pervasive regulation of the industry and the long history of a substance abuse problem. These regulations possessed individualized suspicion requirements and testing upon the occurrence of accidents or potentially dangerous mistakes.

The Court states that "[t]he Government's interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a school, or prison, 'likewise presents *special needs* beyond normal law enforcement that may justify departure form the usual warrant and probable cause requirements' *Griffin v. Wisconsin*, *supra*, 483 U.S. at 873 - 874, 107 S.Ct., at 3168." The Court further states, "[i]t is undisputed that these and other covered employees are engaged in safety sensitive tasks." 489 U.S. at 620, 109 S.Ct., 1415.

Also, the Court, in allowing these suspicionless searches, has recognized "that the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. [Citations omitted]." 489 U.S. at 623, 109 S.Ct. at 1416. In the present case, there are no such problems with obtaining a warrant: a warrant can be obtained through the normal process with no great threat of imminent danger caused by the delay. Also, the candidates can avoid being detected by simply abstaining from the use of drugs for the required period of time it takes to rid the body of drugs, because the candidate will know

well in advance the time he is to be tested.[1] The testing is patently absurd for determining whether a person is a drug user, considering the easy avoidance of the drug detection within the body. The real reason for O.C.G.A. § 21-2-140 is more clearly explained by Georgia Representative Bob Holmes who stated that it was passed for more symbolic reasons.[2] When examining the facts logically, no purpose can be determined for the drug test other than a symbolic purpose.

In *Skinner*, the Court notes that, "[o]ur cases indicate that even a search that may be performed without a warrant must be based, as a general matter, on probable cause to believe that the person to be searched has violated the law." 489 U.S., at 624,

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[1] O.C.G.A. § 21-2-140-c The candidate has to take the test 30 days prior to qualifying for candidacy. The date of qualifying will be known to the candidate, so he simply has to remain drug free for a certain known period before the test.

[2] The majority has delineated the government's purported interest in ensuring that candidates "have what it takes" to hold public office as justification for the suspicionless urine testing of candidates. However, the available subsequent legislative history indicates that in passing O.C.G.A. § 21-2-140, the Georgia General Assembly did not appear to be motivated by concerns that these politicians exercise their "best judgment and skill," but rather by the desire to enact a symbolic measure:

> " One of the sponsor's of the original 1990 legislation ... proposed the legislation out of a sense of fairness rather than any genuine fear that state politicians were not drug free. The sponsor of the 1990 legislation felt that if city council or state politicians require drug testing of state employees, they too should undergo drug testing. Additionally, if in order to appease public concern about the rights of government employees, the politicians themselves should be treated similarly." Edith M. Shine, *Legislative Review*, 9 Ga.St. U.L.Rev. 212, 218 (1992) citing Telephone Interview with Rep. Bob Holmes, House District No. 28 (Apr. 10 , 1992).

109 S.Ct., at 1417. In *Skinner, a* breath test is only required upon individualized suspicion, and blood and urine tests are required upon a specific incident in operation of the railroad. *Ibid*.

In the present case there is no real basis given for drug testing candidates, other than a candidate may possibly use drugs. The fact that the drug test are easily avoided minimizes chances of actually detecting drugs in a candidate. There are no facts of a long history of politicians using illegal drugs or problems resulting from drug use by politicians. Again, because there is no historic or current real demonstrative evidence that would indicate problems of drug use among candidates/politicians, and no compelling governmental interest exist for drug testing of candidates, the only conclusion that can be reached under the *Skinner* reasoning is that the drug search/testing does not meet the reasonable search requirement under the Fourth Amendment. The urine testing procedure is no minor intrusion upon a person's Fourth Amendment right and privacy interest.

The Court recognized in *Skinner,* "the procedures for collecting the necessary samples, which require employees to perform an excretory function traditionally shielded by great privacy, raise concerns not implicated by blood and breath testing." 489 U.S., at 626, 109 S.Ct., at 1418. Also, the *Skinner* Court finds that, "[m]ore importantly, the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees." 489 U.S., at 627, 109 S.Ct., at 1418. And the Court points out, "[h]ere, however , the covered employees have long been a principal focus of regulatory concern." 489 U.S., at 628, 109 S.Ct., at 1419. Further, the Court states, " the Government interest in testing without

showing of individualized suspicion is compelling. Employees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." And the Court compares them to the employees in a nuclear power plant. 489 U.S., at 628, 109 S.Ct., at 1419.

In the present case, the situation is not similar. No pervasive regulation of candidates of this kind has ever existed. The Government's interest in searching an individual without a showing of individualized suspicion must be compelling. 489 U.S., at 628, 109 S.Ct., at 1419. The candidates subject to drug testing do not normally discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences, unlike the employees in a nuclear power plant. No history of a similar pervasive regulatory scheme exist for politicians and the compelling needs of health and fitness are not implicated and no evidence of extreme danger is shown.

The required compelling interest of the State is not present, the only basis for the search is an unsubstantiated fear of the use of drugs by those running for office. The candidates are to be the models for what the U.S. Constitution represents: a democratically elected official that is sworn to uphold the United States Constitution. Ironically, in Georgia, the candidate *is* required to breech this very oath by submitting to what she considers an unconstitutional search.

National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S.Ct. 1384 (1989), reinforces the proposition that the probability of harm must be great where a search is otherwise considered unreasonable under the Fourth Amendment. The *Von Raab* Court provides at length the dangers of illicit drug users in drug-enforcement and the potential great harm they can do to other agents and members of the public. 489 U.S. at 664, 109

S.Ct. at 1390, thus, finding the searches reasonable. 489 U.S. 656, 668-672, 109 S.Ct. 1388-1392. To emphasize the need of the drug testing, the Court finds "[t]he Customs Service is our first line of defense against one the greatest problems affecting the health and welfare of our population." 489 U.S. at 668, 109 S.Ct. at 1392. The Court compares employment with the Customs Service with employment in the U.S. mint and the military, and, thus, finds a compelling need for the drug testing:

> The Customs Service is our nation's first line of defense against one of the greatest problems affecting the health and welfare of our population. We have averted before to "the veritable national crisis in law enforcement caused by smuggling of illicit narcotics." [Citations omitted]. . . . The record in the case confirms that through the adroit selection of source locations, smuggling routes, and increasingly elaborate methods of concealment, drug traffickers have managed to bring into this country increasingly large quantities of illegal drugs. . ..
>
> Many of the Service's employees are often exposed to this criminal element and to the controlled substances it seeks to smuggle into the country. [Citations omitted].

489 U.S. at 668-669, 109 S.Ct. at 1392-93.

Based upon these facts, the Court holds that the government has a compelling government interest. 489 U.S., at 670, 109 S.Ct., at 1393. However, Justice Scalia, in his dissent, does not find a compelling interest in this particular case because there is no evidence of any problem that exists with drug agents in their use of drugs. Justice Scalia states in his dissent, "[t]he Court agrees that this constitutes a search for purposes of the Fourth Amendment - and I think it is obvious that it is a type of search

particularly destructive of privacy and offensive to personal dignity." 489 U.S., at 680, 681 109 S.Ct., at 1398, 1399. Each time in previous cases, Justice Scalia notes the Court has pointed to the evidence of the severity of the specific problem and the direct relationship between the search and the serious problem. Justice Scalia goes on to point out that the facts in the *Von Raab* case will be "searched in vain for real evidence of a real problem that will be solved by urine testing of Customs Service employees." 489 U.S., at 681, 109 S.Ct., at 1399. Justice Scalia's dissent further provides:

> in upholding the administrative search of a student's purse in a school, we began with the observation (documented by an agency report to Congress) that "[m]aintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems." *New Jersey v. T.L.O.*, 469 U.S. 325, 339, 105 S.Ct. 733, 741...(1985). When we approved fixed checkpoints near the Mexican border to stop and search cars for illegal aliens, we observed at the outset that "the Immigration and Naturalization Service suggests there may as many as 10 or 12 million aliens illegally in the country," and that "[I]nterdicting the flow of illegal entrants from Mexico poses formidable law enforcement problems." *United States v Martinez-Fuerte*, 428 U.S. 543, 551-552, 96 S.Ct. 3074,3080. . . (1976). And the substantive analysis of our opinion today in *Skinner* begins, "the problem of alcohol use on American railroads is as old as the industry itself," and goes on to cite statistics concerning that problem and the accidents it causes, including a 1979 study finding that "23% of operating personnel were 'problem

> drinkers.' *Skinner* 489 U.S., at 606, and 607, n.1, 109 S.Ct., at 1407, and 1407, n. 1.
>
> The Court's opinion in the present case, however, will be searched in vain for real evidence of a real problem that will be solved by urine testing of Customs Service employees.

489 U.S. at 681, 109 S.Ct. at 1399.

The Court has found a compelling governmental interest only where there are facts that support the existence of a problem resulting in the compelling governmental interest so as to allow a search normally prohibited by the Fourth Amendment. The *Von Raab* majority held that the day to day circumstances of having access to vast quantities of drugs and the temptation from the large amounts of money involved, would put individual agents in a great threat of using illegal drugs and compromising the safety of other agents. Also, the Court found drug agents using illegal drugs would be a danger to the public, as well as putting in jeopardy the entire mission of the drug interdiction effort. 489 U.S. at 669, 109 S.Ct. at 1392, 1393. In addition the Court discounted the agent's expectation to privacy. While the Petitioner does not agree with this particular reasoning of the majority, the *Von Raab* majority of the Court, at least, found some sort of facts that would allow testing. Specifically, the present case is distinguishable from the majority holding in *Von Raab*. The Court found that great danger to society exist in the day to day exposure of agents to drugs, large amounts of money, bribery, and the carrying of firearms. Also, the Court found the potential danger of agents using illegal drugs caused to other agents and the general population to be great. All these concerns combined were necessary to find the imminent danger. No facts or concerns are provided in the present case, such as day to day exposure of agents to drugs or regularly carrying of a firearm.

And the candidates do not have a diminished expectation of privacy caused by traditional government regulation.

In *Von Raab*, the Court tailored the drug testing involved to those individuals in positions where they could cause the greatest harm to other agents, the general public and to the fundamental mission of the service.

> In May of 1986, the Commissioner [of customs] announced implementation of the drug-testing program. Drug tests were made a condition of placement or employment for positions that meet one or more of three criteria. The first is direct involvement in drug interdiction or enforcement of related laws, an activity the Commissioner deemed fraught with obvious dangers to the mission of the agency and the lives of the customs agents. [Citation omitted]. The second criteria is that the incumbent carry firearms, as the Commissioner concluded that "[p]ublic safety demands that employees who carry deadly arms and are prepared to make instant life or death decisions be drug free." [Citation omitted]. The third criterion is a requirement for the incumbent to handle classified material, which the commissioner determined might fall into the hands of smugglers if accessible to employees who by reason of their own illegal drug use, are susceptible to bribery and blackmail.[Citation omitted].

Von Raab, 489 U.S., at 660-661, 109 S.Ct., at 1388 (1989).

B. The candidates Fourth Amendment right to be free from unreasonable search is not diminished where no history of problems exist with drugs being used by candidates for political office. Nor do the candidates have a diminished expectation of privacy where there exist no scheme of pervasive monitoring and regulation of those candidates. The candidates are unlike the individuals in *Skinner* and *Von Raab*, whereby the historical evidence of the problem and the pervasive regulation and monitoring of the employees allowed for warrantless and, in some circumstances, suspicionless searches. In the present case, a balancing of the individual's Fourth Amendment right against the government's interest must be done to determine whether the Fourth Amendment would prohibit the search. The government's interest in conducting the suspicionless searches of candidates has little weight, in the fact that the government's only discernible interest is symbolic and the drug test is easily avoided. However, the Petitioner's interest in being free from an unreasonable search in an area traditionally shielded by great privacy has great weight.

The Court further clarifies its reasoning in allowing unwarranted, suspicionless searches in *Vernonia school District 47 J, v. Acton*, __ U.S. __, 115 S.Ct. 2386 (1995). The Court allows for an otherwise unreasonable search where there exist evidence of drug usage by a particular group of children in public school within the custody of the state. In *Acton*, the Court provided for a balancing test between the government's compelling interest and the student athletes' Fourth Amendment right to be free from unreasonable search by the government. The Court provides:

> As the text of the Fourth Amendment indicates, the ultimate measure of constitutionality of a government search is 'reasonableness.' At least in a case such as this, where there was no clear practice, either approving or disapproving the type search at issue, at the time the constitutional provision was enacted, whether a particular search meets the reasonableness standard "is judged by balancing its intrusion on the individual's Fourth Amendment interest against its promotion of legitimate governmental interests." *Skinner, supra*, at 613, 109 S.Ct. at 1414 (quoting *Delaware v. Prouse,* 440 U.S. 648, 654, 99 S.Ct. 1393, 1396 . . .(1979).

Acton, __ U.S. __, 115 S.Ct. at 2390 (1995).

The *Acton* Court provides that the first factor to be considered in determining whether a search is reasonable under the Fourth Amendment is the nature of the privacy interest upon which the search intrudes:

> The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as "legitimate." *T.L.O.*, 469 U.S., at 338, 105 S.Ct., at 741. What expectations are legitimate varies, of course, with the context, *id.*, at 337, 105 S.Ct., at 740, depending, for example, upon whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park.

Acton, __ U.S. __, 115 S.Ct., at 2391.

The *Acton* Court, in considering the privacy interest, provides that the individual's legal relationship with the state must be taken into account. *Acton*, __ U.S. __, 115 S.Ct., at 2391. The Court notes that although a probationer's home is protected by the Fourth Amendment, the supervisory relationship

between the State and probationer justifies impingement upon the probationer's privacy that would not be constitutional if applied to the public at large. *Ibid*. Primary to the *Acton* Court holding is that children are involved and they are in the custody of the state:

> Central, in our view, to the present case is the fact that the subjects of the policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster.
>
> Traditionally at common law, and still today, emancipated minors lack some of the most fundamental; rights of self-determination – including even the right of liberty in its narrow sense, *i.e.*, the rights to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians. See 59 Am.Jur.2d § 10 (1987). When parents place minor children in private schools for their education, the teachers and administrators of those schools stand *in loco parentis* over the children entrusted to them. In fact, the tutor or schoolmaster is the very prototype of that status. As Blackstone describes it, a parent "may . . . delegate part of his parental authority, during his life to the tutor or schoolmaster of his child, who is then in *loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which employed." 1W. Blackstone, Commentaries on Laws of England 441 (1769).

__ U.S. __, 115 S.Ct., at 2391.

The *Acton* Court, considering the requirements of an educational environment and that there is a constitutional duty to protect the

children, holds that the searches of the children are reasonable within the Fourth Amendment. __ U.S. __, 115 S.Ct., at 2396. After a finding of a 1) special custodial relationship, 2) a substantial duty to protect the children, 3) the reduced rights of a minor, and 4) evidence of the specific problem of drug use among athletes, resulting in a compelling and immediate need for the searches, the court holds the searches are reasonable. __ U.S. __, 115 S.Ct., at 2394-95. And finally, in the Section VI of the majority opinion the Court states, " the most significant element in the *Acton* case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care." __ U.S. __, 115 S.Ct. at 2396. The present case is clearly distinguishable from the *Acton* case. The present case is not dealing with children who are entrusted to the custody of the state that has a duty to care for the children. The candidates' Fourth Amendment right is not lessened in any way because there has been no evidence of a drug problem with political candidates and there is no immediate or compelling need requiring searches. Application of *Acton* would appear to be limited to a situation in which 1) *children* are in the 2) *custody of the State*, thereby reducing the privacy interest of the individual, and 3) a compelling need of the state to conduct searches exist, specifically, the potential for injury with the use of drugs by athletes.

The Court has found in previous cases that the privacy interest involved with urine testing, is one that traditionally involves great issues of privacy. *Skinner, supra,* 489 U.S., at 626, 109 S.Ct., at 1418. The privacy interest of the candidate is legitimate considering the area of privacy, one that traditionally involves great issues of privacy, the relationship of the candidate to the state is not one that deserves or requires constant regulation, there has never been a history of drug problems with candidates/politician, and there is generally no imminent danger

that can be caused by a candidate. Therefore, the suspicionless search of a candidate violates the Fourth Amendment

1. The weight of the government's interest is insubstantial where the drug test is so easily avoided and does not serve any purpose for detecting drugs in the candidates body.

One of the arguments put forth by the Petitioners in *Von Raab, supra*, 489 U.S., at 676, 109 S.Ct., at 1396, to show that the drug testing involved was a violation of the Fourth Amendment was that the testing was not an effective way to test for drugs because drug detection is easily avoided by abstaining from use of the drugs before the test. In the *Von Raab* decision, the Court discounts Petitioner's reasoning because the agents do not have the information of when there will be drug testing and it takes up to (22) days for some people to eliminate a drug from their system. The Court implies that if the drug test is an ineffective method for detecting drug usage, then such a search is a violation of the Fourth Amendment by being an unreasonable search of a person. *Ibid*. In present case, the drug test is performed within 30 days before a known date for qualifying for candidacy.[3] This drug test is easily avoided resulting in it being ineffective and, therefore, the drug test is an unreasonable search that can not be justified by any compelling interest. Because of the noted ineffectiveness of the drug testing procedure, the government's real interest can not in any way be compelling with regard to the detection of drug use by a candidate. The testing may detect drugs in the worst of addicts of the more addictive drugs (e.g. heroin) who can not stop using the drug for even a short time. There is no evidence that such politicians regularly or otherwise inhabit political office. Sufficient police and elective safeguards are in place to prevent

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[3] O.C.G.A. § 21-2-140-c

such occurrences from happening, except in the case of an extreme anomaly. An anomaly is no real basis for abrogating an individual's Fourth Amendment rights.

In deciding whether a government search violates the Fourth Amendment, the Court must weigh the Fourth Amendment right/privacy interest of the individual against the governmental interest. The individual candidate is not: 1) in any area of work that is traditionally and pervasively regulated similar to the railroad, 2) a probationer, 3) a child, 4) in the custody of the government where the government is responsible for that person's care, 5) a person who has forfeited his rights by any act of wrong doing and, finally, 6) in a position to do immediate great harm even if she is elected. The purported purpose of the testing, to detect drugs in a candidate's blood, is easily defeated by the drug testing time requirements. The only real interest of the government would appear to be simply a symbolic gesture. The weight of the government's interest is insignificant relative to the individual's Fourth Amendment right.

Like Justice Scalia, dissenting in *Von Raab*, one can "not believe for a minute that the driving force behind these drug-testing rules was any feeble justification put forth by counsel" in the present case. 489 U.S. at 685, 109 S.Ct. at 1401. The more likely reason is suggested by Georgia State Representative, Bob Holmes, indicating a desire to enact a symbolic act.[4] By examining the ineffectiveness of the procedure for testing for drugs and the purpose stated by Representative Holmes, the conclusion that the purpose of the drug testing is merely a symbolic act is one that is easily deduced from these facts. While others may articulate the reason differently, there is no

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[4] Edith M. Shine, *Legislative Review*, 9 Ga.St. U.L.Rev. 212, 218 (1992)

substantial evidence or logical reasoning that the testing is done for any other purpose than for symbolic purposes.

C. The logic of allowing suspicionless searches which are based on an unreasonable fear that is not supported by any facts, opens the door for an effective judicial repeal of the Fourth Amendment.

Again, the legitimate governmental interest must be a compelling interest. *Skinner*, *supra*, 489 U.S., at 638, 109 S.Ct., at 1419; *Von Raab*, *supra*, 489 U.S., at 670, 109 S.Ct., at 1419. If a search that ordinarily falls within the protection of Fourth Amendment is allowed when there is no evidence of a specific problem or there is a no evidence of high probability of the occurrence of a problem, but only a subjectively perceived great danger by the government, then there is, in part, an abrogation of the Fourth Amendment. A person could be searched simply because the existence of an unreasonable fear that society holds to be true for which there are no supporting facts. The President, U.S. Congressmen, Judicial appointments and many people working for or involved with the government could be searched because of the fear that a person "might" be using drugs, reasoning that it would be important that no one be placed in any governmental position when they "might" be using drugs, as was attempted in *Georgia Ass'n of Educators v. Harris*, 749 F.Supp. 110 (N.D.Ga 1990) (district court held law that all candidates for public employment be drug tested unconstitutional, as it violated Fourth and Fourteenth Amendments of the U.S Constitution.) Where does the searching/testing stop when an unreasonable and unsubstantiated fear is allowed to supersede the United States Constitution?

Again, urine test searches are in an area that traditionally involve great issues of privacy. *Skinner, supra*, 489 U.S., at 626, 109 S.Ct., at 1418. Under the logic allowing the compelled excretory searches in the present case, a search of all candidates'

homes and any other private areas would be allowed just to be sure they are not involved with drugs.

Justice Scalia points out in the *Von Raab* dissent that there are no facts that drug agents were taking drugs or that this testing will solve any real problems. In the present case there is no evidence of illegal drugs taken by political candidates and there are no problems indicated. There are no contacts in the jobs of candidates, generally, with drugs in the nature of contacts involved similar to that of a drug agent's involvement. To allow this search is to nullify part of the Fourth Amendment. There is no evidence of a problem and no justification for searching a political candidate: "In *Skinner, Bell, T.L.O., and Martinez-Fuerte,* we took pains to establish the existence of special need for the search or seizure—a need based not upon the existence of a 'pervasive social problem' combined with speculation as to the effect of that problem in the field at issue, but rather upon well-known or well-demonstrated evils *in that field*, with well-known or well-demonstrated consequences." Justice Scalia's dissent, *Von Raab*, *supra*, 489 U.S. at 684, 109 S.Ct. at 1400.

Essentially, if the case at bar is upheld as constitutional, all the legislative branch has to do to allow a search is to raise a mere concern for a pervasive social problem, combine it with speculation and they thereby have the means to conduct a search that is otherwise protected by the Fourth Amendment with no substantive proof that a problem exit with that particular person. If this type of search in the present case is reasoned not to be a Fourth Amendment violation, it is certainly within the parameters of such reasoning to allow searches of all persons working within the government. For example, all teachers could be searched simply because they deal with children, who are the future of the United States, and there is a possibility the teachers could use drugs and do harm to our children. The Petitioner argues the Fourth Amendment does not allow such searches that

are without suspicion and where there is no evidence of danger, but merely a possibility.

In the present case, nothing supports the suspicion of any drug related activity among candidates. The police authority with there ability to search on probable cause can take care of any problems that arise. The State has never shown any substantial problem that has resulted from drug use by those in political office. So should the Court abrogate the Fourth Amendment right simply based on some fear that has no factual basis of support that some disaster could occur? If O.C.G.A. § 21-2-140 stands, a search can not be denied based on any situation where the majority perceives a great threat based on no real facts. The Fourth Amendment does not allow for searches based on fear and it does not allow suspicionless searches of political candidates. Under the logic of *Chandler*, 73F.3d 1543 (1996), a person could be searched where ever there is a any kind of a fear that a person might be using drugs. The logic of the court below could be applied to substantially repeal the Fourth Amendment.

In the present case, no compelling interest of the government can be found. The political candidates are chosen by the majority of voters of the specific geographical area in which they are located. The government should not have the right to deny someone access to the ballot based simply on the fact there is an unreasonable fear that a candidate could be using drugs when the voting population will choose the candidate. The safeguards built into the elective process and the use of constitutional probable cause searches are sufficient to protect the people from drug users in political office.

II. Is the establishment of drug-testing scheme, as is set forth in O.C.G.A. § 21-2-140, a restriction on free expression as well an unconstitutional restriction upon the rights of voters to choose their elected officials, thus, violating the First Amendment of the United States Constitution.

The issue of whether 1) the compelled act of drug testing is a forced act of symbolic speech, or whether 2) the disqualification of the candidate for performing the symbolic act of refusing to submit is an unreasonable restriction on free speech, involves several questions. First there is the issue whether there is speech involved by being forced to act or taking the action of refusal. *Texas v. Johnson* 489 U.S. 397, 109 S.Ct. 2533 (1989). Second if there is speech involved, one must determine whether there is a compelling interest that allows the government to restrict the speech involved. *See Communist Party of Indiana v. Whitcomb*, 94 S.Ct.656, 662, 414 U.S. 441 (1974), *United States v. O'Brien*, 88 S.Ct. 1673, 391 U.S. 367 (1968). This interest of the government must be examined in respect to the speech interest involved, considering the relationship of the individual with the state. *Communist Party of Indiana v. Whitcomb*, 94 S Ct. 656, 414 U.S. 441 (1974).

A. The Libertarian candidate's refusal to take a drug test is a symbolic action that is a deliberate statement made by the candidate, recognized as speech under the First Amendment, analogous to the symbolic action taken in *Texas v. Johnson*. The prohibition of the candidate's right to refuse taking the drug test, refusal resulting in the disqualification of his or her eligibility to be a candidate for state office, is a prohibition of free speech. The prohibition of free speech is a violation candidate's First Amendment right.

The First Amendment does not simply protect the spoken or written word. It also incorporates those actions that are, in effect, speech. We are all aware of the cliché that "action speaks loader than words." The Court has recognized certain acts are communicative:

> The First Amendment literally forbids the abridgment only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word. While we rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," *United States v. O'Brien*, at 376, 88 S.Ct. at 1678, we may have acknowledged that conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments,' *Spence*, at 409, 94 S.Ct., at 2730.
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> In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message

would be understood by those who viewed it." 418 U.S. at 410-411, 94 S.Ct., at 2730.

Texas v. Johnson, 489 U.S. 397, 404, 109 S.Ct. 2533, 2539 (1989).

The action desired to be taken by the Libertarian candidates is to refuse to submit to the drug tests; however, the candidates are forced to take an action that is completely opposed to their constitutional beliefs and their personal, political Party ideology. They are forced to submit themselves to what they believe to be an unconstitutional search, acting in contradiction of their fundamental beliefs that such a government intrusion is prohibited by the Fourth Amendment. In effect, they are compelled to make a statement[5] through an action that speaks much loader than any spoken or written word. The Libertarian candidates are denied the right to make a political statement, regarding the government's right to make an unreasonable search, by the act of refusing to submit themselves to a symbolic drug test. If a potential candidate refuses to be tested, she will not be allowed to be a candidate for office, forcing them to submit to the test. The conduct of the candidate, refusing to submit to the drug test, possesses sufficient communicative elements to bring the First Amendment into play because "[a]n intent to convey a particularized message was present, and . . . the likelihood was great that the message would be would be understood by those who viewed it. 418 U.S. at 410-411, 94 S.Ct., at 2730." *Johnson, supra,* 418 U.S. at 410-411, 94 S.Ct., at 2730. The act of complying to the test is communicative and the purpose is symbolic, as was recognized by Georgia

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[5] The compelled symbolic statement being forced upon the candidate is the statement that the candidate accepts the right of the government to make an unconstitutionally intrusive search for the purpose of simply qualifying to be a political candidate.

Representative Bob Holmes as well as one of the sponsor's of the original 1990 act.[6]

The Court has recognized the symbolic nature of an act, i.e., that an act can be equivalent to speech, as with the burning of an American Flag:

> That we have little difficulty identifying an expressive element in conduct relating to flags should not be surprising.
>
> "The flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas."

Texas v. Johnson 49 U.S. 397, 404, 109 S.Ct. 2533, 2539, citing *West Virginia board of Education v. Barnette*, 319 U.S. 624,632 S.Ct. 1178, 1182. Clearly, the act of a Libertarian refusing to submit to the constitutionally infirm search/drug test required by the government, or the act of submitting to a search/drug test conducted by the government is powerful symbolic speech.

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[6] "One of the sponsor's of the original 1990 legislation ... proposed the legislation out of a sense of fairness rather than any genuine fear that state politicians were not drug free. The sponsor of the 1990 legislation felt that if city council or state politicians require drug testing of state employees, they too should undergo drug testing. Additionally, if in order to appease the public concern about the use of illegal drugs politicians must infringe upon the rights of government employees, the politicians themselves should be treated similarly." Edith M. Shine, *Legislative Review*, 9 Ga.St. U.L.Rev. 212, 218 (1992) citing Telephone Interview with Rep. Bob Holmes, House District No. 28 (Apr. 10 , 1992).

B. When the right of free speech is abridged by the government, a significant and compelling interest is required by the government to overcome the weight of the Petitioner's First Amendment right and the Fourth Amendment right. No evidence exist that there is a problem with candidates using drugs or any other resulting problem; and the only logical reason for the State to require the testing is to compel the candidates to make a symbolic statement of support for the drug war. Therefore, the weight of the government's right is insignificant in relation to Petitioner's rights.

The Court, in *Whitney v. California*, 274 U.S. 357, 47 S.Ct. 641 (1927), upheld a California statute that provided that a group that advocated violence or other unlawful methods of terrorism as a means of accomplishing industrial or political reforms, and the gathering of such groups to advocate such policies was illegal. The *Whitney* Court:

> upheld the statute on the ground that, without more, 'advocating' violent means to effect political and economic change involves such danger to the security of the state that the state may outlaw it. Cf. *Fiske v. Kansas*, 274 U.S. 380, 47 S.Ct. 641, 71 L.Ed. 1095 (1927). But *Whitney* has been thoroughly discredited by later decisions. See *Dennis v. United States*, 341 U.S 494, at 507, 71 S.Ct. 857, at 866, 95 L.Ed. 1137 (1951). These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Brandenburg v. Ohio, 395 U.S. 444, at 447, 89 S.Ct. 1827, at 1829 (1967),

In short form, the Court is requiring there to be some imminent danger caused by the particular speech in question for the Government to be able to encroach upon the fundamental right of free speech. The Court further provides that:

> Accordingly, we are here confronted with a statute which, by its on words and as applied, purports to punish mere advocacy and to forbid the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments. The contrary teaching of *Whitney v. California*, *supra*, can-not be supported, and that decision is therefore overruled.

Brandenburg, 395 U.S. 444, at 449 89 S.Ct. at 1830-1831.

The reasoning in the *Brandenburg* case, with its overruling of *Whitney*, stands for the proposition that the First Amendment and other fundamental right concerns can not simply be brushed aside in a situation where no real immediate danger is threatened. The Court has held some real danger must exist to allow the Government to limit the Fourth Amendment, as indicated in the Petitioner's argument above. While providing law abiding candidates to the electorate is an important concern, there are substantial other mechanisms that provide the people with assurances as to this concern: police enforcement, media reporting, the politician's relationship with the people in the government and contact with the general public. There is no substantive reason to violate a political candidates' First and Fourth Amendment fundamental rights.

The Respondents and the 11th circuit majority have implicitly argued that *United States v. O'Brien*, 88 S.Ct. 1673, 391 U.S. 367, (1968), provides that no compelling interest is

needed for a state regulation on the basis of the following portion of the *O'Brien* decision:

> To characterize the quality of the governmental interest which must appear, the court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is justified if it is within the constitutional power of the government; if it furthers a substantial Government interest that is unrelated to the suppression of free expression; if the governmental interest is unrelated to the suppression of free speech; and if the incidental restriction on alleged Freedoms are no greater than is essential to the furtherance of that interest.

O'Brien, 88 S.Ct. 1673, 1379, 391 U.S. 367, 376, 377 (1968).

Regardless of the recharacterization of the nature of the interest required by the *O'Brien* Court, the Court did not change the requirement that the government have a substantial, compelling, or paramount interest to encroach on an individual's freedom of speech. The requirement of having a compelling interest is especially true in the situation where the free speech involves political debate.

The majority of the Eleventh Circuit Court of appeals in the present case holds that "Georgia's drug testing statute passes muster under the framework of *O'Brien*." *Chandler*, 73 F3d 1543, 1548 (11th Cir. 1996). The Petitioner respectfully disagrees with this conclusion. First, while it is may be generally within the power of the state to prescribe qualifications for its elected officials, it is not within the power of the state to violate the candidates First or Fourth Amendment right. Second the statute does not further any substantial governmental interest. The

purpose of the statute has been shown to have been enacted for symbolic purposes; and it has been shown in argument that the stated purpose for the testing is to determine whether the candidate is a drug user is easily defeated given the time period for taking the test. Third, the purpose of the government is the suppression of free speech. The candidate is being forced perform to perform an act of communication, an act of speech that is contrary to her position as to the meaning of the constitution, by accepting the requirement that he she urinate into a container so the urine can be tested for drugs. There can be little doubt that the State is trying to force speech on an individual, speech that belongs in a political debate: a Georgia representative has been quoted as saying the statute was enacted for symbolic purposes, an act of communication.[7] The candidate is making a different statement by refusing to do the act. The Libertarian candidate is making the statement that such intrusive searches violate the Fourth Amendment, and that the justification of this search based on the drug war is no real justification. Fourth the statute is more restrictive of expression than is necessary, because there is no evidence of a problem and, therefore, no need for any such test. Because the drug test is 1) easily avoided, 2) it violates the candidates First and Fourth Amendment rights, and 3) it was simply enacted for symbolic purposes, the degree of restriction it places upon the candidates constitutional rights is unjustifiable. See *O'Brien*, *supra*, 88 S.Ct., at 1379, 391 U.S., at 376, 377

The formalistic application of the test used in O'Brien applied by the 11th circuit in this case appears to be out of line with *Brandenburg*, 395 U.S. 444, 89 S.Ct. 1827, *supra*, and *Texas v. Johnson*, *supra*, 49 U.S. 397, 109 S.Ct. 2533. In

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[7] Edith M. Shine, *Legislative Review*, 9 Ga.St. U.L.Rev. 212, 218 (1992) citing Telephone Interview with Rep. Bob Holmes, House District No. 28 (Apr. 10 , 1992).

Johnson, the mere potential that their would be a breech of peace every time a flag was burned was not a sufficient interest to proscribe such symbolic speech:

> To accept Texas' argument that it need only demonstrate 'the potential for breech of the peace', Brief for Petitioner 37, 'and that every flag burning necessarily possesses that potential, would be to eviscerate our holding in *Brandenburg*. This we decline to do.'

Texas v. Johnson, 49 U.S. 397, 409, 109 S.Ct. 2533, 2542.

Similar to the reasoning in the *Johnson* case, to accept Georgia's "argument that it need only demonstrate the potential for" a drug impaired politician holding office could inflict damage on the population, and that every candidate possesses that potential, would be to eviscerate the Court's holding in *Brandenburg*. *Ibid*. To eviscerate the holding in *Brandenburg* would mean to allow restrictions on First Amendment Speech simply because there is only an unsubstantiated threat of danger. The potential danger in the present case is not sufficient to allow the abrogation of the First Amendment right of free speech in the present case.

"[T]his Court has held in many contexts that the First and Fourteenth Amendments render invalid statutes regulating advocacy that are not limited to advocacy of action. And as we have so often emphasized, '[p]recision of regulation must be the touch stone in an area so closely touching our most precious freedoms.'" *Communist Party of Indiana v. Whitcomb*. 94 S Ct.656, 661, 414 U.S. 441, 447 (1973) citing *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 340 (1927). There is no precision in the Georgia law requiring the candidates to have a blood test. First, it denies the candidates First Amendment right to protest the drug testing by refusing to take the drug test.

Second, it denies a candidates First and Fourth Amendment rights where there is no compelling interest. Because the Georgia legislature can provide no evidence that a drug problem exist with candidates or that it causes any problems for those in the legislature, no sufficient interest exists for the Georgia legislature to encroach on the individual's First and Fourth Amendment rights. There is no precision in a law that requires the sacrifice of fundamental rights because only the generalized fear that candidates may use drugs.

C. O.C.G.A § 21-2-140 is an unconstitutional restriction upon the rights of voters to choose their elected officials, thus, violating the First Amendment.

While it is true that States may administer the electoral process, this administration is not without limits:

> "To be sure, administration of the electoral process is a matter that the Constitution largely entrust to the States. But in exercising their powers of supervision over elections and in setting qualifications for voters, the States may not infringe upon basic constitutional protections." *Kusper v. Pontikes*, 414 U.S. 51, at 57, 94 U.S. 303, at 307, 38 L.Ed.2d 260 (footnote omitted). At stake are the appellants' First and Fourteenth amendment rights to associate with others for the advancement of political beliefs and ideas.
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> "The rights to associate with the political beliefs of one's choice is an integral part of the basic constitutional freedom." *Ibid.*, *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S.Ct. 5, 10, 21 L.Ed.2d 24 (1968). At stake as well are the appellants' interest as party members in casting an effective ballot. See *Bullock v.*

Carter, 405 U.S. 134, 142-144, 92 S.Ct. 849, 855-856, 31 L.Ed.2d 92 (1972).

Thus, burdening access of the ballot, rights of association in the political party of one's choice, interests in casting an effective vote and in running for office, not because the party urges others "to do something now or in the future . . . [but] . . . merely to *believe* in something," *Yates v. United States*, *supra*, 354 U.S. 298, 77 S.Ct. at 1080, is to infringe interests certainly as substantial as those in public employment, tax exemption, or the practice of law. For "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights . . . ." *Reynolds v. Sims*, 377 U.S. 533 , 562, 84 S.Ct. 1362, 1381, 12 1.Ed.2d 506 (1964). "Other rights, even the most basic are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526, 535, 11 L.Ed.2d 481 (1964).

Communist Party of Indiana v. Whitcomb, 94 S Ct.656, 662, 414 U.S. 441, 449-450 (1974).

"Thus, burdening access of the ballot, rights of association in the political party of one's choice, interests in casting an effective vote and in running for office, not because the party" or its candidates uses or promotes the use of illegal drugs but merely to stand up for their Fourth Amendment right to be free from a warrantless, suspicionless and unreasonable search "is to infringe interests certainly as substantial as those in public employment, tax exemption, or the practice of law." For "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights." *Ibid*.

The Court declares that, "in exercising their powers of supervision over elections and in setting qualifications for voters,

the States may not infringe upon basic constitutional protections." *Whitcomb*, 94 S Ct.656, 662, 414 U.S. 441, 449-450 (1974).citing *Kusper v. Pontikes*, 414 U.S. 51, at 57, 94 U.S. 303, at 307, 38 L.Ed.2d 260 (footnote omitted). The state of Georgia does not merely infringe upon the Petitioners basic Constitutional rights, but it runs carefree, trampling over these rights.

The Libertarian party is a party of people who believe the drug war is unnecessary and a great waste of resources by the Federal and State government. They, also, believe that the government does not have the constitutional right to make such intrusive searches on the individual where no suspicion of wrongdoing exist. The candidate's refusal is both a statement that they reject the actions taken in the "drug war" and the resulting constitutional violations. To restrict the candidates first Amendment right to make such a political protest where they have broken no law and no compelling interest is served violates the First and Fourth Amendment, and the intent of the U.S. Constitution that the people of this country live in a free society.

In the case at Bar, the libertarian candidates are attempting to make a politically charged statement that they refuse to submit to a constitutionally prohibited government search. But upon refusal of the test, the candidates are then prevented from participating in the electoral contest. The state is forcing the candidate to comply with the drug test by otherwise preventing them from being a candidate. The candidate is prevented from making this powerful statement if he chooses to be a candidate for office.

There is a slight possibility that a candidate "might" use drugs; but their is a great possibly that if a candidate commits an illegal act, the police, the press, the electorate or the people with which the candidate associates will be aware of it. Again, no compelling need of the state exist that requires such searches that

violate the Fourth Amendment or such violations of the First Amendment. Given that we are speaking about a law that interferes with an individual's First and Fourth amendment rights, and rights of election ballot access and association, Georgia does not have a sufficiently compelling interest to counter the weight of the rights of the individual. The State's lack of a compelling interest is even more apparent considering there are no facts to support drug usage by the legislature, and, in addition, there is a lack of any contact with drugs related to the job, unlike the situation for the Drug Agents in *Von Raab*.

CONCLUSION

The Court should hold unconstitutional O.C.G.A. § 21-2-140 reversing the Eleventh Circuit Court of Appeals.

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